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ABSTRACT

This report reviews the seven times that the courts have considered the question of whether school boards can remove books from school libraries. Because the first and the three most recent cases upheld the rights of boards, while the other three cases were won by plaintiffs who had filed their cases against the boards, the differences in the cases are analyzed. The facts of the case, testimony, and reasons cited by the judges for denying or upholding decisions are summarized, including prior judicial rulings. The following cases are discussed in order: (1) Presidents Council, District 25 v. Community School Board No. 25, 457 F.2d 289 (1973) U.S.C.A., Second Circuit; (2) Minarcini v. Strongsville City School District, 541 F.2d 577, (6th Cir. 1976); (3) Right to Read Defense Committee v. School Committee, 454 F. Supp. 703 (D. Mass. 1978); (4) Salvail v. Nashua Board of Education, 469 F. Supp. 1269 (D.N.H. 1979); (5) Pico v. Board of Education, Island Trees Union Free School District, 474 F. Supp 387 (U.S.D.C.N.Y. 1979); (6) Bicknell v. Vergennes Union High School Board of Directors, 475 F. Supp. 615 (D.Vt. 1979); and (7) Zykan v. Warsaw Community School Corporation, (N.D.Ind., No. S79-68, Dec. 10, 1979). A 28-item list of legal references is included. (LMM)

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REMOVAL OF BOOKS FROM SCHOOL LIBRARIES

Statement of Issue

Can school boards remove books from school libraries? The issue appears simple enough at first glance. An easy "yes" or "no" answer ought to suffice.

Such is far from the case. Yet it seems that no one questioned the matter in the courts for the many years between 1845 when Horace Mann established the first school libraries in Massachusetts and the early 1970's.

During the last decade, however, swept along on a wave of censorship cases,[1] the courts considered the question seven times. The three most recent cases and the first one upheld the rights of boards. The three cases in the middle were won by plaintiffs who had filed their cases against the boards.

The differences are fascinating.

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Judith K. Meyers
May 28, 1980

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Presidents Council, District 25 v. Community School Board No. 25, 457 F.2d 289 (1973) U.S.C.A., Second Circuit.

In the first case the board voted to remove from all junior high school libraries in the district all copies of Down These Mean Streets, a novel by Piri Thomas. A month and a half later a second resolution was adopted permitting the book to be kept at those schools which previously had the book in their libraries but making it available on a direct loan basis to the parents of children attending those schools. New York state legislation delegates the selection of textbooks and other instructional materials to the local school boards and makes final administrative actions of those boards reviewable in the courts. The book in question depicts life in the Puerto Rican ghetto of New York City. Some parents claimed the book would have adverse moral and psychological effects on 11 to 15 year old children, principally because of the obscenities and explicit sexual interludes. The plaintiffs claimed the book is valuable and had no adverse effects on the development of children.

Since the legislature of the state of New York had by law determined that the responsibility for the selection of materials be vested in the local school boards, and since the Commissioner of Education had defined the purposes of the public school libraries, and since provision was made for court review of administrative procedures, the court did not consider it appropriate to review the wisdom or the efficacy of the board. It declared that its function was to determine whether the board had transgressed the first amendment rights of the teachers, parents, librarian and children. In making this determination the court cited Epperson v. Arkansas[2] in which the Supreme Court stated: "By and large, public education in our

Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

After careful review of the record and the precedents, the court found no impingement upon any basic constitutional values, stating in part "...some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions."

The court denied the appellants' reliance upon Ginsberg v. New York[3] as meaning the minors have an unqualified first amendment right of access to books unless they are obscene, reasoning that the library was not a public book store and did not have to become a repository of books which were without merit either as works of art or science simply because they were not obscene. The court stated that "...the shelving or unshelving of a library book does not violate the constitutional rights of a person to obtain and retain public employment.... This concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover. It would seem clear to us that books which become obsolete or irrelevant or where improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place."

The court also declared that the freedom of speech was not abridged under the circumstances cited in Tinker v. Des Moines Independent Community School District[4] in that classwork was not disrupted, nor was there any substantial disorder or invasion of the rights of others. The expression of opinions on the part of parents, teachers, students and librarian had not been abridged. Discussion of the book or the problems which it emcompassed or the ideas it espoused were not prohibited by the board's removing the book.

Continuing, the court said, "The administration of any library whether it be a university or particularly a public junior high school, involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, it is proposition we cannot accept."

The court also denied the applicability of Keefe v. Geanakos[5] and Parducci v. Rutland[6] as cases which involved the discharge of teachers for the assignment of material for outside reading which school officials found offensive and inappropriate with concomitant issues of procedural due process which were not present in the case at bar.

Minarcini v. Strongsville City School District, 541 F.2d 577, (6th Cir. 1976).

The question was next broached in the second of the prominent Minarcini cases. Here it was one of three issues questioned, and the only one of the three in which the board was not upheld.

In a heated community debate the board ordered Kurt Vonnegut's Cat's Cradle and Joseph Heller's Catch 22 removed from the high school library. Both parties in the case agreed that neither the literary value of the novels nor obscenity were at issue, rather first and fourteenth amendment rights.

In overturning the district judge's decision regarding the removal of the books from the library, the court recognized his strong reliance on Presidents Council, saying that it appeared that the judge "...read the previous decision as upholding an absolute right on the part of the board to remove and presumably destroy any books it regarded unfavorably without concern for the first amendment." The appellate court stated that they did not read the opinion so broadly, citing the qualifying clause in the earlier opinion, "...particularly where there is no showing of a curtailment of freedom of speech or thought...."

The court went on to say, "A library is a storehouse of knowledge. When created for a public school it is an important privilege created by the state for the benefit of the students in the school. That privilege is not subject to being withdrawn by succeeding boards whose members might desire to 'winnow' the library for books the content of which occasioned their displeasure or disapproval. Of course, a copy of a book may wear

out. Some books may become obsolete. Shelf space alone may at some point require some selection of books to be retained and books to be disposed of. No such rationale is involved in this case." The board was silent, with the exception of a minority report written by one of the members, about why the books had been removed. In the absence of any explanation of this action by the board, the court concluded that the board "... removed the books because it found them objectionable in content and because it felt that it had the power, unfettered by the First Amendment, to censor the school library for subject matter which the Board members found distasteful."

Continuing, the judge said, "Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School or to choose any particular books. Once having created such privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members." Pickering v. Board of Education,[7] Keyishian v. Board of Regents[8] and several other cases were cited in support of this principle.

The court also claimed, "The public school library is also a valuable adjunct to classroom discussion. If one of the English teachers considered Joseph Heller's Catch 22 to be one of the more important modern American novels (as, indeed, at least one did), we assume that no one would dispute his right to say so in class and his students' right to hear him and to find and read the book. Obviously the students' success in this last endeavor would be greatly hindered by the fact that the book sought had

been removed from the school library. The removal of books from a school library is a much more serious burden upon freedom of classroom discussion than the action found unconstitutional in Tinker...."[9]

Several more cases were cited to establish that this restraint on free expression was not minimized by the availability of the book in sources outside the school.

Going on, the court declared, "A library is a mighty resource in the marketplace of ideas.[10] It is specially dedicated to broad dissemination of ideas. It is a forum for silent speech."[11]

The judge acknowledged that the issue being considered was more difficult than a direct restraint of speech. It concerned "...the right of students to receive information which they and their teachers desire them to have." In establishing this point, the court cited many prominent cases, including Red Lion Broadcasting Co. v. FCC,[12] Stanley v. Georgia,[13] Lamont v. Postmaster General,[14] Thomas v. Collins,[15] Martin v. Struthers,[16] Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.,[17] and Griswold v. Connecticut,[18] but relied particularly on Kleindienst v. Mandel[19] and Procunier v. Martinez,[20] in which the right to receive information and ideas was upheld under the first amendment.

Right to Read Defense Committee v. School Committee, 454 F. Supp. 703 (D.Mass. 1978).

The plaintiffs also won the lengthy and complicated third case which was to obtain an injunction requiring the school board to return a banned book to a high school library.

This time the book was an anthology of student writing Male and Female. The action was prompted by a parent's objection to the language in one selection, "The City to A Young Girl," a poem written by a 15 year old New York City high school student, replete with street language.

The English department in the high school offered courses including adolescent literature, Hispano-American literature, poetry, creative writing and women in literature, dealing with such provocative themes as homosexuality, drug abuse, sexual experiences and ghetto life.

The librarian purchased the book which was one of a set of 1000 paperbacks offered by a reputable publisher at an attractive price. The collection was assembled by professional librarians and teachers. The district's standard procurement procedures were followed in ordering the collection. After the books were received, the librarian reviewed all of them, although she was unable to read every page of all 1000 books. She felt the book would be useful in the English classes and recognized the two editors of the anthology as highly regarded professionals.

The book had been on the shelves over a year and a half before any objection. Then there ensued several months of furor in which the book was referred to over and over again in the community newspaper and

at board meetings with words like "dirty, filthy, crude, trash, rotten, vile, offensive, garbage, objectionable, salacious, obscene, low down, lewd, obnoxious and tasteless."

Among the more interesting facts of the case was the school committee's chairman refusing to give its three female members copies of the poem, and the fact that the committee took its action to remove the book apparently after seeing only copies of the poem and never even setting eyes on the book itself.

The superintendent, the high school principal and the librarian defended the book. The school's selection process included the procedure recommended by the American Library Association for considering challenges to library material.

At one point the committee chairman attempted to have the librarian reassigned to a classroom teaching position claiming she was "out of the mainstream of contact with the youngsters in a classroom situation." At another the superintendent ordered the principal to remove the page on which the poem appeared from the book, which he did, but continued to keep the book in his office.

Shortly after the law suit was filed the committee passed two more resolutions which had been prepared by counsel. The first reaffirmed the decision to remove the book from the library on the grounds that 1) the book dealt with "sex education," not a school subject; 2) the poem had a potentially unhealthy and counter-productive effect on some children; and 3) the committee preferred that even sex education books in the

library not contain words and phrases considered "filthy, shocking and obscene by a large section of the community."

The committee chairman had previously circulated petitions for the purpose of demonstrating that the poem was not acceptable under local community standards.

In deciding this case the district judge first denied the committee's claim of unconstrained authority to remove books from the shelves of the school library, said to be derived from various state statutes giving it a "general charge" of the public schools within its jurisdiction and directing it to purchase textbooks and other supplies. The committee argued that it was not required to purchase the book for the library and therefore could remove it at will. The court disagreed and determined that under the circumstances of the case, the removal of the book was an infringement of the first amendment rights of the students and faculty of the school.

The judge cited Shelton v. Tucker[21] noting that the "vigilant protection of constitutional freedoms is nowhere more vital than in American schools," and recognizing that "the fundamental notion underlying the first amendment is that citizens, free to speak and hear, will be able to form judgments concerning matters affecting their lives independent of any government suasion or propaganda." Therefore, "...a school should be a readily accessible warehouse of ideas." Further, "The Nation's future depends upon leaders trained through the wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of

tongues /rather/ than through any kind of authorative selection.'"[22]

Next the judge recognized the interplay between the first amendment goals and the functions of the schools and noted that the courts have occasionally intervened in the administration of school affairs to establish first amendment rights of students and faculty, concluding "...the First Amendment is not merely a mantle which students and faculty must doff when they take their places in the classroom," citing Meyer v. Nebraska,[23] Epperson v. Arkansas,[24] Tinker v. Des Moines[25] and West Virginia Board of Education v. Barnette.[26]

He affirmed that local authorities must continue to be the principal policy makers in the public schools, citing Epperson v. Arkansas.[27]

Noting the tension between the necessary administrative powers of the local authorities and the first amendment rights of those within the school system, the judge said, "Clearly, a school committee can determine what books will go into a library and, indeed, if there will be a library at all. But the question presented here is whether a school committee has the same degree of discretion to order a book removed from a library." He went on to cite the contrast between the rulings in Presidents Council and Minarcini.

The judge declared that "...the defendants' heavy reliance on Presidents Council presumes incorrectly that the holding there would afford a school committee the absolute right to remove a disfavored book from a library, without any concern for the First Amendment rights of students and faculty. Such reliance overlooks the Second Circuit's implicit

acknowledgment that, however absolute may be a school board's discretion in selecting books, there are boundaries to its authority to remove a book from a library."

"Here," he said, "there is no evidence that the challenged anthology is obsolete. Indeed, there was ample evidence to support the plaintiffs' assertion that the work is relevant to a number of courses taught at Chelsea High School. No contention has been made that the book was improperly selected, insofar as Chelsea procurement regulations were concerned. Despite their continuing objection to the language employed, defendants do not now contend the work is obscene. Limitations of resources such as money and shelf space are not factors here. The book has already been purchased and paid for. It is a small paperback approximately one inch thick. There has been no suggestion that its presence in the library has contributed to any shelf space problem."

"This record leaves this court with no doubt that the reason the Committee banned Male and Female was because it considered the theme and language of City to be offensive."

The judge also said that the resolution reciting reasons in addition to the language and theme was "a self-serving document that rewrote history in an effort to meet the issues of this litigation. In simple terms it was a pretext."

Continuing, the judge stated, "...not every removal of a book from a school library implicates First Amendment values. But when, as here, a book is removed because its theme and language are offensive to a

school committee, those aggrieved are entitled to seek court intervention." The court cited Mount Healthy City Board of Education v. Doyle[28] as precedent which acknowledges that the reasons underlying the actions of school officials may determine their constitutionality.

As in Minarcini, the committee was under no obligation to purchase the book, but it did, and thereby created a constitutionally protected interest.

Tinker[29] and Lamont[30] were cited in establishing a standard that when first amendment values are implicated, the local officials removing the book must demonstrate some substantial and legitimate government interest. This does not require that the book be a threat to school discipline, as in Tinker,[31] but that an interest comparable to school discipline must be at stake.

The judge found no substantial government interest was served in banning the book. The weight of the testimony was that the poem was a work of at least some value that would have no harmful effects on students, although the defendants' case was based on the premise that language offensive to the committee and some parents had no place in the school. This argument was countered by citing Keefe v. Geanakos[32] which said, "With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper in education."

The judge acknowledged the crudity of the language, saying the poem was not "...a polite poem. Its language is tough, but not obscene. Whether or not scholarly, the poem is challenging and thought-provoking. It

employs vivid street language, legitimately offensive to some, but certainly not to everyone. The author is writing about her perception of city life in rough but relevant language that gives credibility to the development of a sensitive theme. City's words may shock, but they communicate." In support of this position the judge quoted from Cohen v. California,[33] "Words are often chosen as much for their emotion as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for the emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."

The judge denied the committee's claim to an absolute right to remove the book stating, "It has no such right, and compelling policy considerations argue against any public authority having such an unreviewable power of censorship. There is more at issue here than the poem City. If this work may be removed by a committee hostile to its language and theme, then the precedent is set for removal of any other work. The prospect of successful school committees 'sanitizing' the school library of views divergent from their own is alarming, whether they do it book by book or one page at a time."

The court declared, "What is at stake here is the right to read and be exposed to controversial thoughts and language--a valuable right subject to First Amendment protection." This assertion was supported by reference to Red Lion Broadcasting Co. v. FCC.[34] "It is the purpose for the First Amendment to preserve an uninhibited marketplace of ideas

in which truth will ultimately prevail.... It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here."

The judge returned to Tinker[35] to reaffirm, "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."

In his concluding remarks the judge again quoted Minarcini, saying that the library is "a mighty resource in the marketplace of ideas." He went on, "There a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. The student who discovers the library is on the way to a life-long experience of self-education and enrichment. That student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom. The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure."

Salvail v. Nashua Board of Education, 469 F.Supp. 1269 (D.N.H. 1979).

In the fourth case a high school student, a high school teacher and adult residents and taxpayers which brought action against the Nashua Board of Education claiming deprivation of due process and first amendment rights by removal of several issues of MS magazine from the high school library also won their case.

Here the New Hampshire State Department of Education had sent a set of advisory guidelines for the selection of instructional materials and for review of any challenges to the same to each of the school districts in the state. Upon receipt of the guidelines the board established a committee which in turn drafted certain interim "Guidelines For Selecting Instructional Materials," which were in effect at the time of the events in question. The guidelines were very thorough and provided for an Instructional Materials Reconsideration Committee to reexamine material challenged by the public.

One board member who held strong religious and patriotic views about the type of materials that should be available to high school students introduced a resolution to withdraw the magazine from the school library after complaining about it for several months. Photocopies of classified advertisement sections from one of the issues were appended to the resolution. His objections were based on the fact that the magazine contained advertisements for vibrators, contraceptives, materials dealing with lesbianism and witchcraft, gay material, what he described as a pro-communist newspaper ("The Guardian"), trips to

Cuba, and records made by known communist folk singers.

The board president and superintendent urged that the interim guidelines be followed in examining the materials.

However, the first member was joined by another board member who believed that the proper test for materials to be available for reading by high school students was whether they could be read aloud to his daughter in the classroom and who took the position that the guidelines should be set aside and the board should act instantaneously in this matter. All the issues of the magazine were subsequently removed from the library.

During the trial the student testified that she found the magazine of value in her assignment because it discussed important social issues from a feminist point of view. She also said sexual matters were openly discussed at the school and that she worked afternoons in a store that sold vibrators.

Two English teachers testified that they had assigned work in the magazine and found it valuable.

The librarian testified that the magazine was neither obscene, patently offensive, nor in contravention of community standards, and had value for research, being indexed in standard library periodical indexes. A second librarian gave essentially the same testimony, adding that the magazine had been used in a neighboring high school since 1975.

A number of letters were sent to the board complaining about its failure to follow the review procedure.

After the law suit was filed, the board met and voted to return two of the issues of the magazine to the library and also approved final revised guidelines for the selection of instructional material which were clearly worded to include board members.

The judge began his findings by establishing that as in Minarcini the board was required neither to provide a library nor choose any particular books for it, but once having created it, it could not place conditions on its use solely related to the social or political views of board members. It also recognized the principle from Right to Read which affirmed that a state, having acted when not compelled, may consequently create a constitutionally protected interest.

Upon reviewing the issues of the magazine which had been banned, the court found that while some of the articles might be offensive to some, they were not obscene, and they did contain material which would be of interest to someone researching the current feminist viewpoint on matters of social interest.

Evidence was also presented that the magazine taken as a whole did not lack serious literary, artistic, political, or scientific value as required by Miller v. California.[36] The court also recognized the principle from Cohen v. California[37] that prohibits governments from "cleansing public debate to the point where it is grammatically palatable to the most squeamish among us." The court also found that the interim guidelines were applicable in the case. It denied the defendants' reliance on Presidents Council, using the qualifying clause as it had

been used in Minarcini and Right to Read. It also focused on the protection to communication, its source and recipient as established in Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.[38]

The court noted that the disapproval that certain members of the board had to articles and advertisements in the magazine apparently did not extend to similar materials in the library, which led to the conclusion that it was the political content, rather than sexual overtones, that led to the banning. Removal of a publication for political reasons is clearly unconstitutional. As in Right to Read, the court found the resolutions passed after the litigation had begun were self-serving pretexts. Denied was the notion that the magazine's presence was an invasion of privacy as in FCC v. Pacifica Foundation.[39] Also, the magazine was banned without reading it. The female members of the board were not shown it, and no claim was made that the magazine was obsolete, worn out or that space was unavailable . Cases that claimed that students were captive audiences and that considered whether allegedly "filthy" materials should be promoted or repressed were found to be inapposite.

Shelton v. Tucker[40] was again cited for the protection of constitutional freedoms in the schools. Right to Read was cited as establishing the requirement that some substantial and legitimate government interests must be served by removal of a publication. Keefe v. Geanakos[41] was also used to describe the sensitivities of parents in determining what is proper education.

As in Minarcini the availability of the magazine in the public library was judged to have no merit in the case. The Minarcini marketplace clause was also quoted again, as well as its concluding statement.

The court held that the defendants failed to demonstrate a substantial and legitimate government interest sufficient to warrant the removal of the magazine and ordered 1) the board resolutions which banned it null and void, 2) enjoined the board from the continued banning of the magazine, ordering that the missing issues be replaced and the magazine be resubscribed to, if necessary out of the first sums available for library purposes, and 3) enjoined the board to follow the current guidelines for complaints about publications in the library regardless of whether or not its members raised them.

Pico v. Board of Education, Island Trees Union Free School District, 474 F.Supp. 387 (U.S.D.C.N.Y. 1979).

Just as the issues seemed to be settling down into a predictable pattern, along came the next case, three months later, brought under the Civil Rights Act.

In this case both parties agreed to the following facts. The president and another member of the board attended a conference sponsored by a conservative parents group called Parents of New York United (PONY-U), where they obtained a collection of excerpts from books which the group had classified as "objectionable."

After the meeting the president and vice-president of the board searched the card catalog of the high school library and found cards for nine of the "objectionable" books. The president then asked the principal of the junior high school to check his school catalog in which one additional "objectionable" book was found. Subsequently another school official discovered another "objectionable" book in the curriculum for the 12th grade literature course, which had been approved by the board. The board passed a resolution removing the books from the libraries and eventually approved their delivery to the board office where members could personally review them.

The board issued a lengthy press release explaining its actions to the community. It also appointed a Book Review Committee of four staff members, none of which was a librarian, to make recommendations on the educational suitability of the books.

The board resolved that Laughing Boy by Oliver LaFarge be returned without restriction; that Black Boy by Richard Wright be returned with students' access conditioned on parental approval; and that the remaining nine books--Slaughter House Five by Kurt Vonnegut, The Naked Ape by Desmond Morris, Down These Mean Streets by Piri Thomas, Best Short Stories by Negro Writers edited by Langston Hughes, Go Ask Alice, anonymous, A Hero Ain't Nothing But A Sandwich by Alice Childress, Soul On Ice by Eldridge Cleaver and A Reader for Writers, edited by Jerome Archer--be removed from the elementary and secondary libraries and for use in the curriculum.

Both parties also essentially agreed on the motivation of the board. "The pleadings and affidavits submitted by all parties and amici demonstrate that the board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral and in bad taste, making them educationally unsuitable for the district's junior and senior high school students."

There were four issues in this case: 1) jurisdiction, 2) class certification, 3) the constitutionality of the board's action in removing the books from "use in the curriculum." and 4) the constitutionality of the board's action in removing or restricting access to library books.

The case was heard under the jurisdiction of Section 1983 of the United States Code which distinguishes it from all the other cases discussed heretofore.

The motion for certification as a class action suit was denied in that the claims of the plaintiffs were not typical of the claims which might be asserted by all members of the class, namely, all the students in the Island Trees junior and senior high schools, nor were there events "making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

On the curriculum question, without any sharp issue of academic freedom, the court concluded that respect for the traditional values of the community and recognition of the board's control over educational content precluded violation of a first amendment right. Finally, public education implies public control.

The reasoning on the constitutionality of the board's action in removing or restricting access to library books was more complex. First, the court identified five causes of action: 1) violation of the New York State Constitution Article 1, Section 8, guaranteeing liberty of speech, 2) violation of the same provision insofar as it guarantees academic freedom to librarians, 3) violation of the first amendment of the U.S. Constitution guaranteeing freedom of expression, 4) violation of the same amendment insofar as it guarantees academic freedom to librarians, and 5) violation of Section 1983 of the U.S. Code. These five causes reduce to a single claim under the first amendment of the U.S. Constitution.

The plaintiffs, who were students, were ruled to have no standing to assert the rights of librarians to academic freedom since none of the

librarians of the Island Trees schools was party to the case.

Plaintiffs relied heavily on Minarcini, Right to Read and Salvail, the last three cases heard, but the court followed the reasoning set forth in Presidents Council, also a New York case, and Epperson v. Arkansas,[42] quoting at length from the decision.

The court also pointed out that although Minarcini, Right to Read and Salvail each "purports to 'distinguish' Presidents Council, upon analysis it is clear that in both language and result they simply adopt the book tenure concept and hold that once a school library book has been selected and acquired, the first amendment prevents the school board from later removing it because of its content." The court said, "...in deciding what books to place in a school library a school board not only may, but must choose on the basis of content."

The court continued that public schools mean public control as set forth in East Hartford Education Association v. Board of Education[43] and that one of the principal functions of public education set forth in James v. Board of Education[44] is "indoctrinative, to transmit the basic values of the community." The book tenure principle would infringe upon an elected board's discretion in determining what community values are to be transmitted.

The Island Trees School Board removed books "...because it viewed them as vulgar and in bad taste, a removal that clearly was content based. Whether they were correct in their evaluation of the books is not the issue. Nor is the issue whether, assuming the books to be vulgar and

in bad taste, it is a wise or even desirable educational decision to sanitize the library by removing them, thereby sheltering the students from their influence. Such issues should be decided and remedied either by the school district's voters, or by the State Commissioner of Education on an appropriate administrative appeal."

"Here, the issue is whether the First Amendment requires a federal court to forbid a school board from removing library books which its members find to be inconsistent with the basic values of the community that elected them. Presidents Council resolved this issue by holding that a book that was improperly selected 'for whatever reason' could be removed by the same authority which was empowered to make the selection in the first place."

The court also stated, "...a court simply is not competent to decide what books are to be in a school's library. The proper agency is the school board, and it would be illogical and unrealistic to deprive a board of its most relevant criterion, content, for making that decision."

Further, "Significantly, the school board's action here involved no religious question, either free exercise or establishment; nor was there a ban on the teaching of any theory or doctrine; nor has there been a restriction imposed on classroom discussion, or a penalty inflicted on any teacher or librarian. Moreover, these restrictions have denied no student the right to be silent or open speech..they have not directly inhibited discussion in the classroom or elsewhere in the schools; and they have focused upon no particular student or group."

Finally, "The board has restricted access only to certain books which the board believed to be, in essence, vulgar. While removal of such books from a school library may, indeed in this court's view does, reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right."

Bicknell v. Vergennes Union High School Board of Directors, 475 F.Supp. 615 (D.Vt. 1979).

In this case the board adopted a formal written "Library/Media Policy" after almost twelve months of discussion. Patterned after the "School Library Bill of Rights" approved by the American Association of School Librarians, it contained policy statements covering the objectives on the school library media center, and various "rights" and "responsibilities" of persons connected with the library, as well as procedures and criteria for materials selection. It established a procedure for responding to citizen complaints, with members of the board retaining control over the acquisitions and removals, and the professional personnel limited in accordance with board policy. Statements in the policy were highly idealistic, and did not qualify it as a "library bill of rights" for students, teachers or librarians.

Requests were filed for the review of two books: The Wanderers by Richard Price and Dog Day Afternoon by Patrick Mann. The board moved to remove the first book from the library "because it is obscene and vulgar." Complainants also cited the vulgar language, obscene material, immorality, perversion and violence in the second book. However, the board voted not to remove it from the library permanently but to place it in the principal's office pending creation of a special restricted shelf in the library.

The board also acted to restrict the professional discretion of the school librarian in the selection and acquisition of additional works, prohibiting her from purchasing any additional major fictional works

until further vote of the board. Later the board ordered that any book purchase other than those in the category of "Dorothy Canfield Fisher, science fiction and high-interest-low vocabulary" be reviewed by the school administration with the assistance of the board.

The court established five claims in this case: 1) violation of the students' first amendment rights to receive information, 2) violation of the students' first amendment rights by imposing a freeze on new library acquisitions and permanently screening all major purchases, 3) violation of the students' right to due process under the district's own policy, 4) violation of the school librarian's due process rights by creating and enforcing the reconsideration and removal policy and by freezing and screening new library acquisitions, and 5) violations of the teachers' constitutional rights by "creating a repressive atmosphere."

The school employees claims are most easily dealt with. The court viewed instrusion on their rights as not sharp and direct, as required by Presidents Council, and miniscule. The librarian's rights were held not to be violated because she served in accordance with board policy. The selection of works for the library was viewed as a curricular rather than methodological matter. The court denied that the librarians had an independent first amendment right to control the collection of the school library under the rubric of academic freedom.

The court regarded the students' rights most seriously, citing the importance of such rights under East Hartford Education Association v

Board of Education,[44] Shelton v. Tucker,[45] and Tinker v. Des Moines,[46] also holding that "A library is a vital institution in the continuing American struggle to create a society rich in freedom and variety of thought, broad in its understanding of diverse views and cultures and justifiably proud of its democratic institutions. The life and utility of a library are severely impaired whenever works can be removed merely because they are offensive to the personal, political or social tastes of individual citizens, whether or not those citizens represent the majority of opinion in the community."

However, the court did not hold that what is desirable as a matter of policy is necessarily a matter of constitutional law, citing Epperson v. Arkansas[47] and stating that "Although the court does not entirely agree with the policies and actions of the defendants we do not find that those policies and actions directly or sharply infringe upon the basic constitutional rights of the students."

Moving on to cite and quote from Presidents Council, the court also held that school authorities need not base their decision to purchase or remove a book on articulable educational grounds.

Recognizing Minarcini and Right to Read, the court said it was not bound to follow those rulings. It denied that the premises in Presidents Council were altered by Virginia Board of Pharmacy v. Virginia Consumer Council[48] or Kleindienst v. Mandel,[49] asserting that the right to receive information in the free speech context is merely the reciprocal of the right of the speaker. Neither did the court grant

the right of publishers of certain works to have a constitutionally protected right to have their works purchased by a high school library or retained on its open shelves after purchase. Students remained free to purchase the books in question from private bookstores, to read them in other libraries, to carry them freely during the school day. Finally, the court decided that the school Library/Media Policy created no right to read or right of access apart from those rights secured by statute and constitutional law.

Zykan v. Warsaw Community School Corporation, (N.D.Ind., No. S79-68, Dec. 10, 1979).

The final case slipped under the wire in December of last year. According to the February 1980 issue of the General Digest, it has not yet been published in the West Publishing Company series.

In this case a student challenged a school board's right to remove certain books from the school library, among other matters, charging his academic freedom and right to know guaranteed by the first and fourteenth amendments to the U.S. Constitution had been violated.

Citing Clark v. Holmes[50] and Brubaker v. Board of Education,[51] the court held that "...compared to the constitutional limits which a state has in restricting communication generally, it is a much more lax constitutional limit which school officials have in restricting communications to students. And, since the students' right to receive constitutionally protected communication is only the reciprocal of the constitutional right to send the communication, it follows that, compared to the constitutional limit which a state has in restricting the general receipt of communications, it is a much more lax constitutional limit which school officials have in restricting students' receipt of communications."

The plaintiff failed to prove a violation of a constitutional right, and the board was upheld.

Summary

States delegate responsibility for selection of books in public school libraries to local boards of education.

The courts have not reviewed the wisdom or efficacy of boards in this matter. Rather, they have considered whether first amendment, fourteenth amendment or civil rights have been violated.

In denying the removal of books from school libraries, the following reasoning has been used:

1. A school library is a privilege, created by the state, which may not be withdrawn by succeeding school boards whose members might desire to remove books, the content of which occasioned their displeasure or disapproval. Neither may a board place conditions on the use of the library related solely to the social or political tastes of the members.

2. Where a board did not explain its actions and where evidence indicated that it had removed books from the school library because it found them objectionable in content and because it felt it had the power, unfettered by the first amendment, to censor the school library, the removal of books was held to violate the first amendment.

3. Removal of books from a public school library is a serious burden on classroom discussion, not minimized by the availability of the books in sources outside the school. This restraint on expression may not generally be justified by the fact that there may be other times, places, or circumstances available for such expression.

4. Students' first amendment rights to know give them standing to challenge removing books from a school library by a board of education.

5. A board can determine what book goes into a library and if there will be any library at all.

6. However absolute a board's discretion in selecting books, there are boundaries to its authority to remove a book from a school library.

7. Not every removal of a book from a school library implicates first amendment values, but when a book is removed because its theme and language are offensive to a board, those aggrieved are entitled to seek court intervention.

8. When first amendment values are implicated, local officials removing a book from a school library must demonstrate some substantial and legitimate government interest and, though they are not required to demonstrate that the book is a threat to school discipline, they are required to demonstrate that an interest comparable to school discipline is at stake.

9. When a board removed an anthology because it felt that the language and theme of one poem in the anthology would have a damaging effect on high school students, when evidence supported the literary worth of the poem, when the relevance of the anthology to courses taught was demonstrated, when testimony of experts denied the harmful effects of the book on students, and when the board did not contend that the book was obscene, improperly selected or contributed to any shelf space problem, the removal was denied.

10. Boards do not have an absolute right to remove a book from a high school library, for policy considerations argue against any public authority having an unreviewable power of censorship.

11. The right to read and be exposed to controversial thoughts and language is a valuable right protected by the first amendment.

12. Students may not be regarded as closed circuit recipients of only that which a state chooses to communicate and may not be confined to expression of those sentiments that are officially approved.

13. Once the board adopts interim guidelines regarding the removal of books from the school library, it is obliged to follow them.

14. Political content as a basis for removal of a publication from a school library is impermissible.

In upholding the removal or limitations to the use of books in school libraries, these are the findings:

1. A board may make a book available only in those schools having the book and on request of a parent.

2. Students and their parents cannot maintain action challenging a board of education's removal of books from school libraries as a class action.

3. Students and parents lack standing to assert the rights of librarians to academic freedom.

4. The "book tenure" principle infringes upon the elected school board's discretion in determining what community values are to be transmitted, one of the principal functions of public education.

5. The school boards accuracy and wisdom in removing books from the school library should be decided and remedied either by the school district's voters or by appropriate administrative appeal.

6. The first amendment does not require courts to forbid school boards from removing library books which board members find to be inconsistent with the basic values of the community that elected them.

7. School boards are not required to articulate an educationally related reason for refusing to purchase any particular book for the high school library.

8. Publishers of various works do not have any constitutionally protected right to have their works purchased by the high school library or retained on the open shelves after purchase.

9. Students' rights to review works through the school library is no broader than the constitutional right to receive information.

10. Where students remain free to purchase books from private bookstores and to read them in other libraries, to carry them to school, and to discuss them freely during the day, the school board's barring of books from the library does not deprive students of their right to free expression.

11. Removal of books from the school library does not deny teachers any constitutional rights by creating an oppressive atmosphere where their right to freely discuss literature is chilled.

12. Protection of due process extends only to bona fide liberty or property interests created by federal or state law. Where a school board's library and media policy repeatedly assert the primacy of the school board in the operation of the school library, actions of the school board in barring certain books from the library do not deprive students or librarians of due process rights by violating any rights created by the policy.

13. Removal does not infringe on first amendment rights of school employees.

14. School librarians do not have an independent first amendment right to control the collection of the school library under the rubric of academic freedom; the selection of works from the library is a curricular rather than a methodological matter; and school boards have considerable discretion as to the substantive content of the curriculum.

Opinion seems to be divided on the following issues:

1. Whether the removal of books seriously abridges discussion.

2. Whether the availability of the books in other places in the community at other times, places and circumstances is relevant to the argument.

3. Whether students' constitutional rights give them standing to challenge the removal of books or is broader than the right to receive information.

4. Whether local officials must demonstrate substantial and legitimate government interest upon the removal of a book.

Recommendations

In light of the above information, the following recommendations are made:

1. Boards of education should adopt school library/media policies, with attention to such items as objectives of the program, procedures and criteria for the selection of materials and equipment, procedures for handling complaints.

2. Once adopted, policies should be followed.

3. Policies should also be periodically reviewed.

4. Selection of materials in controversial areas should proceed with much care and thoughtfulness.

5. Consideration should be given to involving students and members of the community in the selection process.

6. Boards of education should proceed cautiously weighing carefully any statements and actions they may wish to take regarding any materials under attack.

7. The courts should continue their deliberations on this important issue.

8. Professional associations, teacher education institutions, and school in-service groups should keep up-to-date in this important area of school law.

Footnotes

1. "Censorship of Textbooks is Found on Rise in Schools Around Nation," N.Y. Times, March 27, 1979, B15.

2. Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968).

3. Ginsberg v. New York, 290 U.S. 629, 88 S.Ct. 120, 20 L.Ed.2d 195 (1968).

4. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

5. Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).

6. Parducci v. Rutland, 316 F.Supp. 352 (M.D.Ala. 1970).

7. Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

8. Keyishian v. Board of Regents, 385 U.S. 589, 606, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967).

9. Supra.

10. Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919).

11. Tinker, supra.

12. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386, 390, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

13. Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

14. Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1964).

15. Thomas v. Collins, 323 U.S. 516, 534, 63 S.Ct. 315, 89 L.Ed. 430 (1945).

16. Martin v. Struthers, 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943).

17. Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 1823, 48 L.Ed.2d 346 (1976).

18. Griswold v. Connecticut, 381 U.S. 479, 482, 84 S.Ct. 1678, 1680-1681, 14 L.Ed.2d 510, 513-514 (1965).

19. Kleindienst v. Mandel, 408 U.S. 753, 763, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1974).

20. Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974).

21. Shelton v. Tucker, 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960).

22. Keyishian, supra.

23. Meyer v. Nebraska, 262 U.S. 390, S.Ct. 623, 67 L.Ed. 1042 (1923).

24. Supra.

25. Supra.

26. West Virginia Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

27. Supra.

28. Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

29. Supra.

30. Supra.

31. Supra.

32. Supra.

33. Cohen v. California, 403 U.S. 15, 26, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971).

34. Supra.

35. Supra.

36. Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973).

37. Supra.

38. Supra.

39. FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978).

40. Supra.

41. Supra.

42. Supra.

43. East Hartford Education Association v. Board of Education, 562 F.2d. 838, 856 (CA2, en banc, 1977).

44. James v. Board of Education, 461 F.2d 566, 573 (CA2 1972).

45. Supra.

46. Supra.

47. Supra.

48. Supra.

49. Supra.

50. Supra.

51. Clark v. Holmes, 474 F.2d 928 (7th Cir. 1973).

52. Brubaker v. Board of Education, 502 F.2d 973 (7th Cir. 1974).

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